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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 514

EDGAR W. STOKES, *Petitioner*,

v.

CONTINENTAL ASSURANCE COMPANY, *Respondent*.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

This suit originated in the Civil Court of Record in and for Dade County Florida by the petitioner against the respondent to recover benefits under a health and accident disability policy (R-4-11). The case was removed to the United States District Court upon the question of diversity of citizenship. Upon jury trial in District Court a verdict was returned for the respondent. The petitioner originally based his

Complaint upon bodily injury resulting from an accident of February 26, 1952 (R-4, 5) but subsequently amended the Complaint to reflect in addition thereto mental disease or illness precipitated by or aggravated by said accident or precipitated by or aggravated by a heart condition occurring on or about May, 1954 (R-62). At the conclusion of testimony, counsel abandoned any alleged disability resulting from a heart condition (R-273, 274).

The petitioner indicated his difficulties originated from the accident in 1952 (R-172, 173), with complications resulting from an earlier coronary condition (R-171), plus a myocardial infarction or heart attack (R-80-84). Nonetheless, the petitioner abandoned any contention of disability originating from the alleged heart condition (R-273, 274).

Bearing on the medical aspects of the case, both Dr. Keedy, the plaintiff's physician, and Dr. Strain, the Court-appointed physician, testified that they subjected the plaintiff to extensive clinical and diagnostic tests and that the results of the tests were negative or essentially negative (R-212, 216, 223, 240). Dr. Patterson and Dr. Taylor attended the plaintiff while he was in the Broward General Hospital in Ft. Lauderdale, Florida, for approximately five or six days subsequent to the accident. Dr. Taylor testified that the hospital record reflected no suggestion of concussion, nor did his diagnosis form indicate same (R-139, 140). Dr. Dornberger (R-77-121) suspected a mild heart attack in May, 1954, but admitted that his associate, Dr. Roberts, disagreed with this diagnosis and suspected the plaintiff had acute rheumatism (R-84, 85). Numerous electrocardiogram tests by Dr. Dornberger reflected only one tracing, the original one in May, 1954,

as abnormal, all others being normal (R-101). He indicated the plaintiff had made an uneventful recovery (R-102), admitting that the heart attack was in the least order of severity and the diagnosis doubtful (R-103). Dr. Keedy's testimony (R-207-231) indicated disability of a mental nature (R-219); however, the doctor admitted his examination of the plaintiff was purely for examination purposes and not for treatment (R-224). He cited psycho-neurotic tendencies, plus some verging on psychotic (R-214) which are matters not within his field (R-225), yet he had not sent the plaintiff to a psychiatrist for treatment (R-225). Dr. Keedy admitted that the electro encephalogram was normal and that he advised an insurance company in June 1953 that the patient was not then totally disabled (R-222). Dr. Strain (R-235-243), a neuro surgery specialist, examined the plaintiff as Court-appointed physician (R-236) and stated "all his neurological examination was within normal limits." (R-240).

Petitioner did not move for a directed verdict and the case was submitted to the jury who returned a verdict for the respondent. The petitioner filed a motion for a new trial, alleging the verdict to be contrary to the law and the evidence (R-64, 65), which motion was denied (R-66), and appeal followed thereafter which assigned as error the denial of the motion for new trial (R-68). The Court of Appeals sustained the District Court verdict, indicating that the question of "the sufficiency of the evidence to sustain the jury's verdict is not before us." (242 F.2d 893, 894). The Brief of the Appellant alleged that the verdict was contrary to the weight of the evidence, but in no instance did it allege nor attempt to prove that the trial

Court's denial of a motion for a new trial was a clear abuse of its discretion.

REASONS FOR DENYING THE WRIT

The petitioner cites in support and as the basis of his requested writ the necessity of a determination by this Court of the right of the Appellate Court to review the denial of a motion for a new trial. This proposition was neither briefed nor argued in the Appellate Court; the various Briefs filed in the Fifth Circuit Court of Appeals by the petitioner, appellant below, who had not requested a directed verdict, raised the proposition that the verdict was contrary to the weight of the evidence. On this point, there is complete unanimity of opinion that the plaintiff's or defendant's failure to move for a directed verdict precludes his challenging on appeal the sufficiency of the evidence. *Aetna Casualty & Surety* v. *Yeatts*, CCA 4, 122 F.2d 350, Aug. 22, 1941; *Boudreaux* v. *Mississippi Shipping Company, Inc.*, CCA 5, 222 F. 2d 954, June 2, 1955; *Cone* v. *West Virginia Pulp & Paper Co.*, 67 S. Ct. 752, 330 U.S. 212, 91 L. Ed. 849. This was the decision rendered by the Fifth Circuit Court of Appeals in this cause.

The petitioner attempts to bridge this gap, i.e., the failure to move for a directed verdict, by alleging that through his motion for a new trial he preserved the question of the sufficiency or insufficiency of the evidence to support the verdict. Again, the various Court decisions reject this contention and clearly recognize and define the distinction between the attributes of a motion for directed verdict and a motion for a new trial. *Marsh* v. *Illinois Central R.R. Co.*, C.C.A. 5, 175

F. 2d 498, July 8, 1949; *Aetna Casualty & Surety* v. *Yeatts*, C.C.A. 4, 122 F. 2d 350, Aug. 22, 1941.

Lastly, as earlier indicated, the petitioner contends for the very first time that the denial of the motion for a new trial is subject to review and that since no determination of this question was made by the Fifth Circuit Court of Appeals, certiorari should be granted with ultimate reconsideration by the Appellate Court of this question.

The question was never presented to the Appellate Court and should not now be initially raised on certiorari. *Springer* v. *U. S.*, 102 U.S. 586; *First National Bank* v. *Commonwealth of Kentucky*, 76 U.S. 353.

The alleged confusion cited by the petitioner on the point of the right to review a denial of a motion for a new trial is more illusory than real. The opinion of this Court in the case of *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, is pertinent as follows:

> "The rule that this Court will not review the action of a Federal Trial Court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions (citing cases), and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes, likewise, a review of such action by a Circuit Court of Appeals."
>
> * * * * *
>
> "It is urged that the refusal to set aside the verdict was an abuse of the trial Court's discretion and hence, reviewable. *The Court of Appeals has not declared that the trial Judge abused his discretion. Clearly, the mere refusal to grant a new trial* where nominal damages were awarded

is not an abuse of discretion." (Emphasis supplied.)

This Court further stated in *U. S.* v. *Johnson*, 327 U.S. 106, 111, 90 L. Ed. 562, 565, U.S. S. Ct., Feb. 4, 1946:

> "It is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial Court made erroneous findings of fact. *Holmgren* v. *U. S.*, 217 U.S. 509, 54 L. Ed. 861; *Holt* v. *U. S.*, 218 U.S. 245, 54 L. Ed. 1021; *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481, 77 L. Ed. 439, 44. While the Appellate Court might intervene when the findings of fact are wholly unsupported by evidence, *U. S.* v. *Secony Vacuum*, 310 U.S. 150, 247, 84 L. Ed. 1129, 1180; *Glasser* v. *U. S.*, 315 U.S. 60, 87, 86 L. Ed. 680, 708, *it should never do so where it does not clearly appear that the findings are not supported by any evidence.*" (Emphasis supplied.)

The *Fairmont* opinion, supra, has been utilized thereafter (the proposition set forth therein was well established prior thereto) to the effect that review of a denial of a motion for new trial may be proper under exceptional circumstances where a *clear abuse* of the trial Court's discretion can be demonstrated. It is patent in all the decisions, mostly relating to the factor of an abuse of discretion where the verdict was excessive and not presenting the question of insufficiency of the evidence, that the proof necessitates a showing of a "*clear abuse of the trial Court's discretion.*" *U. S.* v. *Regents of New Mexico School of Mines*, C.C.A. 10, 185 F. 2d 389, 392, Nov. 8, 1950; *Davis* v. *Yellow Cab Co.*, C.C.A. 5, 220 F. 2d 790, 791, Mar. 30, 1955; *South-*

ern Pacific Co. v. *Guthrie*, C.C.A. 9, 186 F. 2d 926, Jan. 15, 1951, Writ of Certiorari denied Apr. 9, 1951. In 3 Barron & Holtzoff, *Federal Practices and Procedures*, § 1302, p. 224 (Rules Ed. 1950) the author states:

> "A motion for new trial invokes the sound discretion of the Court. An order granting or denying a new trial is not reviewable except for clear abuse of discretion."

Professor Moore recites in 6 Moore on *Federal Practice*, 2d Ed., ¶ 59.08(5), at Page 3819:

> "What review, if any, may be had of the trial Court's grant or denial of a motion for a new trial on the ground that the verdict is against the weight of the evidence? None, *as a general proposition*, and this is in keeping with the usual principles that new trial rulings are, subject to certain narrow exceptions, non-reviewable. The motion for a new trial on the ground that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court, * * * but assuming that the Court has the power to consider the motion and does exercise such discretion, its error in granting or denying the motion, if any, is usually one of fact and non-reviewable. Under unusual or special circumstances, the trial Court's action may *constitute an abuse of discretion* and be reviewable, but *rarely can this be shown.*" (Emphasis supplied.)

The above authorities were cited with approval by the Third Circuit Court of Appeals in the case of *Nuttall* v. *Reading Co.*, C.C.A. 3, 23 F.R.S. 59A. 53, Case 1, 235 F. 2d 546, 548, July 5, 1956, where the Court states:

> "The authority of a trial judge to grant a new trial is expressly recognized by Rule 59, Fed. R.

> Civ. P., 28 U.S.C.A., which in turn refers back to 'any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of the United States * * *.' 6 Moore, *Federal Practice*, ¶ 59.05(5), p. 3759 (2d ed. 1953), discussing Rule 59, says: 'As the motion for a new trial is addressed to the sound discretion of the trial Court, its grant or denial of the motion is not normally subject to reversal in an Appellate Court * * *.' See, to the same effect, 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1302 (Rules Ed. 1950)."

Following thereafter in the case of *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.*, C.C.A. 3, 239 F. 2d 815, 23 F.R.S. 59A. 55, Dec. 28, 1956, the Court noted:

> "* * * it has been repeatedly held that an order denying a motion for a new trial is not appealable. * * * Ordinarily the denial of a new trial either involves an exercise of discretion, which is unreviewable in the absence of a *clear abuse* of it, * * *" (Emphasis supplied.)

Illustrative of the Fifth Circuit Court of Appeals' awareness of the problem involving the function or office of a motion for a new trial, is *Marsh* v. *Illinois Central R.R. Co.*, C.C.A. 5, 175 F. 2d 498, July 8, 1949, wherein the Appellate Court concluded that the trial Court, under the applicable Federal Rules of Civil Procedure, is vested with the right, irrespective of error, to grant a new trial at his discretion if he does not believe the verdict to be correct. The Court noted, at Page 500, that the exercise of his discretion is not ordinarily reviewable on appeal, although a failure to exercise discretion or *an abuse of it may be corrected*. This opinion on the exact point here involved neces-

sarily compels the conclusion that the petitioner's contentions were considered and rejected even though properly presented by his assignments of error or the Brief in this cause. At no time, including this Petition for Writ of Certiorari, has the petitioner presented the contention that the trial Judge clearly abused his discretion in denying the motion for a new trial, and as indicated by the factual material contained in the record herein, no such contention could in good faith be made nor sustained. Since no clear abuse of discretion was alleged nor demonstrated, certiorari should be denied.

As may be seen from Exhibits A, B, and C, (1) No directed verdict was requested, and therefore the sufficiency of the evidence cannot be tested on appeal; (2) a motion for a new trial is distinguishable from a motion for a directed verdict and the refusal to grant a motion for a new trial is reviewable only if a trial Court clearly abused its discretion in granting or denying same; and (3) since the contention that the trial Court clearly abused its discretion has never been presented and was not presented to the Appellate Court, Certiorari should be denied.

Further, these exhibits also indicate that the denial of petitioner's motion for a new trial on the basis that the verdict of the jury was contrary to the weight of the evidence was assigned as error by the Petition. This is also the identical proposition presented in the Petition for Rehearing, i.e., the matter of the insufficiency of the weight of the evidence. This also appears from the Transcript of Record of the United States Court of Appeals, Fifth Circuit, No. 16,232.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari, in that:

1. The Appellate Court properly adjudicated the question of the sufficiency of the evidence.
2. The petitioner has never properly presented the question of the alleged abuse of the Court's discretion in denying a new trial.
3. In view of the decided cases of this Court, U.S. District Courts, and U.S. Circuit Courts of Appeal hereinbefore cited and quoted from, it would seem clear that petitioner has not brought himself within the purview of Rule 19 of this Court respecting "Considerations Governing Review on Certiorari."

Respectfully submitted,

EDWIN A. SWINGLE
ALLAN C. SWINGLE
Attorneys for Respondent

APPENDIX

APPENDIX A

Brief of Appellant As Follows:

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 16,238

EDGAR W. STOKES, *Appellant*

v.

CONTINENTAL ASSURANCE COMPANY, and Illinois Corporation, *Appellee*

BRIEF OF APPELLANT

STATEMENT OF CASE

Edgar W. Stokes sued Continental Assurance Company to recover benefits under a health and accident policy in the Circuit Court of Dade County, Florida. The complaint, as amended, alleged that the assured had become permanently and totally disabled within the meaning of the policy and demanded judgment for accumulated benefits, together with attorney's fees.

The suit was removed to the District Court and the defendant answered generally, denying the allegations as to the injury and breach. The answer contained a counterclaim seeking a declaratory decree and injunction (etc.) to which the assured replied. On a trial to a jury a verdict was found for the defendant, motion for new trial was seasonably made and denied, and this appeal taken.

Questions.

I.

Whether or not the Court erred in denying plaintiff's motion for a new trial on the grounds that the verdict of the jury was contrary to the weight of the evidence when such evidence without serious substantial contradiction established that the plaintiff was completely disabled, either by reason of bodily injury or sickness so as to suffer the loss of all of his business time within the meaning of the contract.

II.

Where an assured who is a doctor became disabled by reason of illness or injury from practicing his profession and sued the insurer for the benefits under the contract of insurance was the burden of proving that he was unable to perform the duties of some other occupation or to perform some other type of work on the plaintiff or the defendant?

The lower Court held that such burden was on the plaintiff.

III.

Was it error for the Court to charge the jury that in the suit above referred to the disability contemplated meant disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged *or in which he might have engaged* within the contemplation of the particular insurance policy.

Specifications of Errors.

The second and third specifications of errors are as follows (R. 8):

2. The District Court erred in making the final judgment dated January 26, 1956.

3. The District Court erred in making and entering its order dated March 9, 1956, denying appellant's motion for a new trial.

Brief of Argument

Question I.

Whether or not the Court erred in denying plaintiff's motion for a new trial on the grounds that the verdict of the jury was contrary to the weight of the evidence when such evidence without serious substantial contradiction established that the plaintiff was completely disabled, either by reason of bodily injury or sickness so as to suffer the loss of all of his business time within the meaning of the contract.

The plaintiff's case was supported by the testimony of himself (169), his wife (197) and the following physicians:

Dr. Dornberger (77)
Dr. Taylor (121)
Dr. Keedy (207)

There was also called as a witness for the plaintiff, Dr. Frederick LeDrew (162), who is an examining physician for the defendant and whose hostility was displayed to the Court on a request that the witness be called as a hostile one (154).

For the defendant there were two doctors: Strain (235) and Stewart (244). Dr. Strain had seen the plaintiff on one occasion, the examination lasting a little longer than an hour (240), and Dr. Stewart had never examined the plaintiff. Dr. Strain was a court-appointed physician who examined the plaintiff on January 15, 1956, which was some eleven days prior to trial.

Dr. Stokes.

Dr. Stokes was the the assured under a contract with Continental Assurance Co., in which it was agreed to pay him $150.00 a month for what was described as loss of business time as follows:

> "If the Insured is disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time without indemnity, therefor becoming due under the provisions of either of paragraphs A, B or C of this Part, and if further such total loss of all business time continues as such without change for more than—3 months—(hereinafter called the excepted period) the company will pay indemnity for the loss of business time occurring thereafter."

according to certain formulas entitled "Total Loss of Time" specified in subparagraph 1, and "Partial Loss of Time" specified in subparagraph 2 (8, 14).

The Doctor had been operating a sanitarium in Louisville, Kentucky, for some twenty-seven years. In this sanitarium he treated alcoholics, drug addicts, nervous patients, mental patients and senile patients. In 1950, he sold his sanitarium but continued its operation under some arrangement with the purchaser until April of 1951. He had a coronary condition in 1946 and, learning that there would be a position available in mental hygiene in Fort Lauderdale, sold the hospital and came to Florida for the purpose of engaging in that occupation. This appears to be a field of medicine which apparently does not require the participant to be examined under state laws (170-172).

On February 26, 1952, while enroute to Florida, the plaintiff had an accident near Clewiston, Florida, a little town about 100 miles northwest of Miami. The weather was cold and rainy. As the doctor approached a bridge

on a curve, he was blinded by the lights of an approaching car, became panicky, put on the brakes and skidded off the road. His car went about 150 or 200 feet, turned over three times and when the plaintiff came to, he was lying in a canal full of water and thought that he was still in the bottom of the car. He got up and walked out to the bank. A police car took him to the Clewiston Inn where he administered some first-aid treatment to himself and spent the night (173).

The next morning before going to Fort Lauderdale, Stokes consulted a doctor in Clewiston, who withdrew the blood from a hematoma on plaintiff's abdomen (175).

About two or three days after he arrived in Fort Lauderdale, the plaintiff woke up with a severe pain in his left leg. He became alarmed, and at his request was admitted to the Broward General Hospital where he was placed under the treatment of Dr. Patterson. Plaintiff remained in the hospital for 5 or 6 days, during which time he was seen by Dr. Patterson and Dr. Taylor, who later testified in the trial. During this time he was suffering from an intense pain in his leg and shock. When he was released from the hospital, he returned to his home in Fort Lauderdale, and over the next few months displayed symptoms of headaches, nervousness, was exhausted, had a ringing in his ears, and when he turned over (176-179).

Some of these symptoms have persisted more or less to the present time, and those that now bother him are noises in his ears, the headaches and the nervousness. Whenever he is under strain, the plaintiff cannot sleep. He cannot remember things, but is getting to the point where he remembers past events better than he was able to a year ago. At that time he could not even remember past events. The day that the trial started, the plaintiff was so confused that after he left the court house his wife had to show him the way back, but on the morning when

he was giving his testimony, he was able to find his way back very clearly (179-184).

Mrs. Stokes.

Dr. and Mrs. Stokes had had some marital difficulties in approximately 1948. About two years before he sold the hospital, the Doctor became very nervous and upset. He could not get along with anyone, and he blamed his wife for everything that was wrong. His business was going down, and she kept begging him to sell it, for which he now blames her. After the hospital was sold, Mrs. Stokes and the Doctor were separated because it was impossible to live with him. He walked the floor practically every night and displayed extreme jealousy. About a year and a half after he had the accident, the parties became reconciled, but his condition has made it "a terrible thing to put up with." She suggested that the Doctor was unbalanced. He feels as though everyone is following him. The plaintiff and his wife live in a house on the corner of a block and cars turning the corner naturally throw their lights on the house, which the Doctor thinks the drivers are doing just to aggravate him. When they sit at the table to eat, he gets up to see the cars when they pass. The blowing of horns makes him think that the act is being done to aggravate him. Before he goes out at night he looks in the closets and under the beds and everywhere, and has many times come into his wife's room in the middle of the night and asked her to whom she was talking, although she had been sound asleep (198-201).

Prior to the accident the Doctor used to discuss his business with his wife, but since then he will not discuss anything with her. He will not tell his wife anything about his affairs. He carries on some correspondence, but simply lets his mail pile up until his desk at home is high with everything. Months and months later he might

look at the mail that should have been attended to earlier. He has his chair and desk piled with mail and things that should be attended to and puts things on the dining room table and will not allow his wife to touch them. He will not allow her in his bedroom except to make up his bed and "fix his floor, his chest and dresser, and everything is piled over everything in there." During the day he sits and reads a little and paces the floor most of the time (202).

Dr. Keedy.

Dr. Keedy is a qualified practitioner in neurology and neuro-surgery. He is a graduate of Amherst College, Cornell Medical College, and his background includes an internship in general surgery at Bellevue Hospital, New York City, a residency in neuro-surgery at Bellevue, a residency and general surgery at Memorial Hospital in Worcester, Massachusetts. He was sent by the Army to the Army Neuro-Surgical School at Columbia University, and was afterwards assigned to the Neuro-surgical Section in Texas, where he stayed about a year. He served a time in the overseas Neuro-surgical Evacuation Hospital in the European Theatre. On his discharge he was attached to the Brain Tumor Registry at Yale University, and since 1948 had practiced Neuro-surgery in the Miami area (208).

Dr. Keedy had seen Dr. Stokes on an average about every six to eight weeks over a period of three years, and the course of his examinations lasted anywhere from an hour to an hour and a half. The first examination commenced on January 30, 1953, and he was still seeing Dr. Stokes at the time of trial (209-210).

In testifying as to what his patient's initial examination consisted of, he stated that he received a history of Dr. Stokes in which the patient said that he had become excessively nervous, felt insecure and not as competent

as he formerly was in taking care of his affairs. Dr. Stokes was afraid to go into any business ventures for fear he would not make the proper decisions. He stated he has trouble spelling certain words which were well known to him, and which he formerly had no trouble with. He stated that at times he noticed he rambled in his conversation and could not remember what he said, so he was unable to finish his conversation. This was attributed to the Doctor having a poor memory. Stokes stated that he had some dizziness which had improved; that he frequently mislays things; continues to have mild headaches, and has heaviness around his heart. He stated that whenever he did anything that required any concentration, it usually produces a headache, and not infrequently, a heaviness around the heart. Stokes complained that he tired easily and became exhausted in attempts to do work. He had a constant itching and ringing and hissing sounds in his ears. (211).

A general physical examination produced results which were essentially negative. The patient was alert and cooperative, although somewhat garrulous and rambling in his history. He was well oriented; he was able to stand in a normal position without swaying. The visual fields were full to gross testing. The extra-ocular movements were well done. Eye vessels showed slight evidence of hardening of the arteries. Hearing was grossly normal. Stokes talks and swallows without difficulty. There was good strength and coordination in all four extremities. Tendon reflexes are active and equal. Blood pressure was normal; heart sounds, regular and of good quality (212).

At the time of his examination Dr. Keedy was of the opinion that the patient was suffering from a post concussion syndrome which was manifested by mild headaches, forgetfulness, difficulty in concentrating, and irritability (212). As Dr. Keedy continued to see the plain-

tiff he observed that over a period of time certain things came out. Primarily phycho-neurotic tendencies, and some tendencies verging on being truly psychotic (213).

The witness further stated that he thought Dr. Stokes was suffering from a disability; that the disability had extended over the period of his examination which had continued for the past three years, and he stated categorically that he thought that occupationally the plaintiff was completely disabled.

DR. DORNBERGER.

Dr. Dornberger is engaged in the practice of internal medicine in Fort Lauderdale, Florida. He was a graduate of the University of Nebraska Medical School in 1938. His internship was interrupted by four years in the United States Army and for the following seven years he was engaged in the practice of internal medicine at the Mayo Clinic, where he was later a consultant in internal medicine (78).

He first saw Dr. Stokes personally on the morning of April 24, 1954, at the witness' office where an electrocardiogram was taken, and the patient sent to the Broward General Hospital (80).

The doctor suspected from the electrocardiogram that his patient had an acute myocardial infarction. He had a low-grade fever, appeared somewhat pale, was extremely apprehensive and short of breath. His blood pressure was normal, but his blood preasure had been recorded at 146/82, which made the witness suspicious that the patient had had an acute heart attack (82).

The witness stated that the summary of the record of the patient in the hospital concluded with this statement:

> "It was the concensus of opinion of the internist who saw him that the clinical diagnosis was postero-

lateral myocardial infarction acute of mild degree. This is the final diagnosis and he will be continued to be treated in this manner. Dismissed." (87).

The witness categorically stated that in his opinion Dr. Stokes was disabled (97). He thought Stokes was totally disabled from a medical standpoint (98). He added that in January of 1955 in one report that he had made in writing in answer to a question as to whether he thought Dr. Stokes would be able to engage in any type of gainful occupation, that the witness had stated that in his opinion it was extremely doubtful whether Dr. Stokes would ever be able to engage in any gainful occupation (99).

The witness then significantly added that his opinion had not changed (since it was formed).

DR. LEDREW.

Before this witness was put on the stand, plaintiff's counsel made an effort to call the witness either as a hostile one, or to get the Court to call him as a Court witness. In both of these acts he failed. His position as to the hostility of the witness arose from the fact that on his deposition it had been brought out that the Doctor had been employed by someone representing the Continental Casualty Company, and stated that he should be loyal to the person employing him. Counsel further represented to the Court that Dr. LeDrew's attitude in his whole deposition was one of hostility all the way through. He said that the Doctor would not read records, from which counsel derived the opinion that the Doctor was hostile (154-155).

Dr. LeDrew was then called to the stand and asked limited questions concerning his background and his examination of the plaintiff. He said that he specialized in the field of physiciatry having graduated in 1919 with

a B.A. degree; obtained an M.A. degree in 1920 and an M.D. degree in 1926. He became a Diplomate of the American Board of Psychiatry and Neurology in 1934 and was a Lieutenant Colonel in charge of the neuro-psychiatric section at the First Air Force. He was employed by the Continental Casualty Company (a company affiliated with appellee) to make a medical examination of Dr. Stokes. The witness saw the plaintiff one time, and in answer to the question as to whether he reported to the insurance company what his opinion was concerning Dr. Stokes' disability, said:

> "I believe I said at that time that in my opinion he was unable to work, at the time I examined him." (162-164).

Dr. Taylor.

Dr. Taylor is engaged in the field of general surgery in Fort Lauderdale, Florida. He graduated in 1935, had approximately four and a half years of residency in Baltimore and North Carolina, spent five and a half years in the Army and had been engaged in the practice of medicine the rest of the time. He first saw Dr. Stokes on March 1, 1952, in Broward General Hospital. He was called in by a local physician to determine whether the plaintiff needed surgery after an accident. He got a general history from Dr. Stokes, and diagnosed his condition as shock, trouble in the legs, bad bruises, contusions and from the history of the patient being unconscious would say that he had a brain concussion (122-124).

The witness had seen the plaintiff several times each year and said that the plaintiff was still concerned about the veins in his leg and believes that one of them will break or give him trouble (134).

He was asked whether he presently had any opinion as to whether Dr. Stokes was suffering from any disabil-

ity and said, yes, that he would say that the plaintiff was disabled, and added that he thought the Doctor was disabled permanently from practicing medicine. The witness said that he had had the Doctor under observation for four years, had seen him lots of times in that period, and that in arriving at his conclusion he had taken into consideration a lot of subjective symptoms which were quite real to the plaintiff as well as the objective things that he had watched and observed from the beginning (134-136).

This concludes the testimony of the witnesses for the plaintiff. There was, of course, cross-examination in which the appellee obtained some qualifications of the witnesses' testimony on direct examination and secured from them certain admissions, but in the main the testimony of the plaintiff and his witnesses was to the effect that he was completely disabled within the meaning of the policy.

The witnesses for the defendant consisted of Dr. Strain and Dr. Stewart.

Dr. Strain.

Dr. Strain is a licensed doctor of medicine specializing in surgery of the nervous system. He graduated from Vanderbilt University Medical School in 1935, and had an internship and assistant residency in surgery at Stamford University Hospital. He spent two years in Lanchow China General Hospital in charge of surgery, taught surgery for three years at Bombay University and was on the surgical staff and taught at Vanderbilt University Medical School for four years on his return from Bombay. He had a fellowship and assistant residency in the Neuro-surgery at Boston City Hospital and had a year and a half Fellowship in Neuro-Surgery at the Lehigh Clinic. He is certified by the American Board of Neurological Surgery and a member of various Associations (236).

He testified as to the history which Dr. Stokes had given him. There is a great deal of history and physical observations combined in the Doctor's statement, but he said that Dr. Stokes' blood pressure was normal; that he was a nervous and voluble man; that he complained that his neck hurt him when he made an extreme motion, but in examining his cranial nerves there were found no abnormalities. The pupils were equal. His visual fields were full and there was no visual weakness. The cranial nerves all functioned normally; the importance of which conclusion lay in the fact that in case of a head injury, the visiting physician usually looks for some paralysis of cranial nerves. Sometimes in such cases one pupil is larger than another, but nothing was found in his examination to suggest any such injury. The witness concludes as follows:

"A. All his neurological examination was within normal limits.

Q. What were your conclusions, then, with respect to this patient from your examination as a specialist in your field neuro surgery?

A. This man now complained of headaches, being nervous following an injury, and his examination neurologically was within normal limits. I felt that the headaches that he complained of were produced by the trauma that he complained of that he had suffered, but there was no sign of any serious damage to his brain, nor to the nerves from that examination.

Q. Were there any findings in your entire examination, Doctor, other than his subjective complaints, that is, the subjective symptoms—things that he talked about or complained about?

A. No, sir. This examination was completely normal so far as the neurological examination was concerned." (237-240).

Dr. Franz H. Stewart.

Dr. Stewart never saw Dr. Stokes but was called as a witness to offset the testimony of plaintiff's witnesses to the effect that the electrocardiogram had shown some evidence of a heart condition. The witness said that on the basis of one electrocardiogram no definite opinion could be reached and from the ones that he had seen he could not find enough to enable him to form a reasonable conclusion that there was any evidence of heart disease. He added categorically that he would say there was no definite evidence of heart disease, but added that the electrocardiogram was not the whole story, and that he had not seen the patient (252).

Argument Regarding Testimony

The plaintiff was only required to prove his case by a preponderance of the evidence; and the Jury, although it was warranted, in selecting some evidence as being favorable for one side or the other and rejecting contradictory evidence, was not justified in applying prejudice or non-evidentiary standards as a part of the process of applying selective criteria. Where the burden is upon one party and the testimony is in equilibrium, the Jury is entitled, upon a dispute of facts, to reject testimony which lacks the patina of probability. But a Jury is no more entitled than a Court (of which it is an arm) to act arbitarily and whimsically. If the evidence preponderates in favor of one of the parties, the Jury is bound to find a verdict for such party.

In this case the plaintiff himself has testified to his disability; and it would not make any difference if all of the doctors in the world testified that he were all right. The Jury would be bound to accept the plaintiff's testimony unless it were convinced that he was committing perjury. There is no evidence that Dr. Stokes has committed perjury, and neither the Court, nor the jury were

warranted in inferring that such was the case. In fact, the Court instructed the Jury that it could not be justified in imputing perjury to anyone. If the Doctor is suffering from a mental condition which is so severe as to prevent him from practicing medicine, then he is disabled regardless of whether or not the medical men agree that his mental condition is real or whether he has any physical ailments. If he cannot work, he cannot work.

But there was a great deal more to the case than the testimony of Dr. Stokes. His wife's testimony is to our mind much more persuasive than the testimony of the physicians because she testified to certain radically eccentric actions of the Doctor which may not be disregarded. We think that the Jury would have been warranted in finding that Dr. Stokes was disabled upon the testimony of Mrs. Stokes alone. However, there is more to the case than that; and while the Court might be warranted in assuming that a wife will tend to support her husband's position in the testimony wherever she can do so, it is not warranted in assuming any more than that, and probably not that much in this case where it appears that the parties had been separated for some time, and the very conditions the Doctor complains of had tended to aggravate the reasons for the separation, or at least its continuance.

The parties had been separated before the Doctor had his accident and had become reconciled after the accident, but the Doctor's condition was difficult to put up with.

Of course, in addition to the testimony of plaintiff and his wife, there is the fact that he was involved in an automobile accident in which, very likely, he could have sustained substantial injuries. The appellee will no doubt try to discredit the testimony of Dr. Taylor that Dr. Stokes had had a brain concussion. An attempt will be made to minimize the extent of Dr. Stokes' injuries and to rule out any possible after effect, which it is assumed would

not follow except in the event of a visible injury to the head. But, of course, there are all kinds of concussions ranging from mild to extremely severe, and the accident that Dr. Stokes was in could certainly have produced almost any kind of traumatic injury, including a concussion of the brain.

All of the medical witnesses for the plaintiff, however, were not on his payroll and all of them were not friends. Dr. LeDrew was a physician employed by the appellee. The appellee might argue that Dr. LeDrew was not hostile. Plaintiff's attorney thought he was hostile and his opinion is entitled to a good deal of weight. If the plaintiff's counsel thought that Dr. LeDrew was a friendly witness, he certainly would have exploited the witness' opinion fully. Drs. Dornberger, Taylor and Keedy all concurred that the plaintiff was disabled. These are reputable medical men; there is no suggestion that they were biased, prejudiced or dishonest, and there is no reason to assume that their opinions were not based on valid medical facts. The fact that they disagreed with Dr. Strain does not mean a thing. Doctors normally disagree with each other, and the situation that exists "when doctors disagree" has become a standard example of limitations upon medical knowledge. The experiences of laymen are legion in which persons will go from one physician to another despairing of either diagnosis or cure, and then suddenly find one physician who will discover the secret of the patient's illness and effectively cure him with simple remedies.

In *Boyd* v. *Gosser*, 78 Fla. 64, 82 So. 758, the Court said:

> "So we have in this case upon the one side the law of mathematical probabilities, and upon the other the law of moral probabilities. 'Preponderance of the evidence' is a phrase which in its last analysis means probability of its truth. In a cause where there is conflicting moral evidence, the jury in the

one case, the chancellor in the other, is required to decide accordingly as the weight of the evidence preponderates in favor of one proposition or the other. That is to say, having no personal knowledge of the transaction under investigation, they must by the application of common knowledge and experience decide which set of witnesses or line of evidence raises the greater probability of its consistency with truth."

The testimony for the plaintiff "raises the greater probability of its consistency with truth." Why? Because normal people will tell the truth rather than lie, will work rather than idle, will prefer health to illness. The policy sued on was issued in 1927. Stokes had the accident in February, 1952. The defendant paid disability benefits for three months and then discontinued them. If plaintiff is attempting to commit a fraud on the company he certainly has waited a long time to put his thoughts into deeds. And he certainly has been able to persuade a lot of reputable people to aid and abet him. To us, it would seem that all of the witnesses were out of step, except Dr. Strain.

In *Equitable Life Assur. Soc. of U. S.* v. *Bomar et al.*, 106 F. 2d 640, suit was brought upon an insurance policy to recover disability benefits and the premiums alleged to have been unlawfully collected.

The Court said that there was substantial evidence tending to show that the deceased was physically weak and had suffered a change in mentality; that he would have spells when his memory would fail completely and that there was a loss of co-ordination in judgment; that he was unable to concentrate or grasp details; that he became irritable, not only with his family, but with his employees and customers and on various occasions would create scenes of violence; that he was restless and unable to sleep well. Dr. Simpson described him as a hopeless wreck, mentally and physically.

In the course of its opinion the Court said:

"(2) In his application for the policy issued in 1924, the insured gave his occupation and business as a 'hardware dealer.' He stated that he had no other occupation and contemplated no change. The disability clause must be construed in the light of these statements. *Prudential Ins. Co.* v *Harris*, 254 Ky. 23, 70 S.W. 2d 949, 953; *John Hancock Mut. Life Ins. Co.* v. *Cave*, 240 Ky. 56, 58, 40 S. W. 2d 1004, 79 A. L. R. 848. Appellant knew that it was insuring Bomar against total disability to transact a business requiring not only physical effort but judgment and discretion.

(3) If the insured was unable either physically or mentally to discharge the important and material duties necessary to the prosecution of his businesses in substantially his usual and customary manner, he was totally disabled. Such are the holdings generally and the Court of Appeals of Kentucky is in accord.

(4) In *Prudential Ins. Co.* v. *Harris*, *supra* (254 Ky. 23, 70 S. W. 2d 951), the court in construing a similar disability clause, said: 'We have construed the provision undertaking to limit the indemnity against disability to perform any kind of labor as contemplating an inability to do all the substantial and material acts necessary to the prosecution of the insured's business or that which is required of him in the performance of his occupation in the customary and usual manner.'

The court further said that—'For twenty years and more this rule of construction has been consistently applied * * *.' See also *John Hancock Mut. Life Ins. Co.* v. *Cave*, *supra*; *Equitable Life Ins. Co. of Iowa* v. *Hauser*, 269 Ky. 374, 107 S. W. 2d 282, 284.

Measured by this test, the evidence was sufficient to sustain the verdict."

In *Colorado Life Co. v. Steele*, 101 F. 2d 448, the plaintiff sued on a health and accident policy and recovered a judgment, which was affirmed on appeal. The Court reviewed the testimony of the plaintiff and decided that it was sufficient to support the verdict, saying:

> "In considering the question of the sufficiency of the evidence, it is our province to determine whether or not there was substantial evidence to sustain the verdict."

The Court then added that since the Jury had resolved the issue in favor of the plaintiff, it must accept the testimony in his favor as true and that he was entitled to draw reasonable favorable inferences therefrom.

In the case at Bar, the evidence does not preponderate in favor of the defendant, although the Jury found in its favor, the Court was not warranted in drawing favorable inferences from such fact. As we have shown, the testimony of the plaintiff and his witnesses was more than enough to establish a preponderance of evidence.

QUESTION II.

Where an assured who is a doctor became disabled by reason of illness or injury from practicing his profession and sued the insurer for the benefits under the contract of insurance was the burden of proving that he was unable to perform the duties of some other occupation or to perform some other type of work on the plaintiff or the defendant?

The lower Court held that such burden was on the plaintiff.

During the trial, the following proceedings took place regarding the instructions to be given the Jury (261):

> "Mr. Goldman: The very cases that Your Honor pointed out to me as a result of our conference

the other day, point out that the burden is on the Insurance Company to show what other occupation than the one the man is in, he could do; and there hasn't been one bit of evidence in here by the Insurance Company that Mr. Stokes could wash windows or teach school, or anything. There isn't any evidence.

The Court: He said he might have engaged in the real estate business.

Mr. Carey: The jury is entitled to draw from all of the evidence whether he could engage in other occupations.

The Court: You are correct, counsel. The burden is on them, when they come to argue the matter, as to whether or not it has been established one way or the other.

Mr. Carey: What we would like is a charge on the burden of proof.

The Court: It is on the plaintiff, and this Circuit has been very diligent about knocking out cases where I said the burden was somewhere else. What they mean by that in the decisions is that on appeal the burden is on them to show there was some miscarriage.

This action of the Court was error. The cases cited under the Third Question hold that ability to engage in some other occupation is irrelevant. In any case, if the insured were in fact able to do some other work, the burden was on the defendant to show this. It is not up to the plaintiff to prove that he could not do any other kind of work. The failure of the Court to charge the Jury on this point might well have caused the obvious miscarriage of justice implicit in the verdict. The omission is made more glaring by the error committed in giving the charge argued under the third question.

Question III.

Was it error for the Court to charge the jury that in the suit above referred to the disability contemplated meant disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged *or in which he might have engaged* within the contemplation of the particular insurance policy.

The Court charged the Jury (278) that:

> "The language of the policy dealing with disability does not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit, but the disability contemplated means disability or inability to the extent of being wholly or permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged, or in which he might have engaged within the contemplation of the particular insurance policy." (See Motion for New Trial—65).

This charge was clearly erroneous and no doubt weighed heavily in the scales which the lower Court picturesquely described as illustrating a way to determine the weight of the evidence.

According to applicable authorities, the Doctor was entitled to recover if disabled to perform his professional duties.

In *New England Mutual Life Insurance Co.* v. *Huckins*, (Fla.) 173 So. 696, an action was brought by the assured to recover disability payments. The policy provided as follows:

"'If the insured * * * becomes physically or mentally incapacitated to such an extent as to be wholly and permanently unable to engage in any occupation or profession or to perform any work for compensation, gain or profit'; * * *"

The judgment was rendered in the Civil Court of Record upon a directed verdict. That judgment was affirmed by the Circuit Court, and the defendant brought certiorari. The plaintiff was a farmer who was injured by an accidental gunshot wound from a small calibre bullet which entered the right side of the right thigh, crossed the abdomen, and entered the left thigh injuring blood vessels. Doctors testified that there was definite damage to the femoral nerve; that he could perform some farming activities and render light manual assistance which did not require the use of his left leg. The testimony was that the plaintiff was not helpless, but he was incapacitated from doing the farm work that he formerly did. In quashing the writ, the Court said:

"As used in the insurance policy here sued on, the words, 'if the insured * * * becomes physically or mentally incapacitated to such an extent as to be wholly and permanently unable to engage in any occupation or profession or to perform any work for compensation, gain or profit,' do not in legal contemplation mean a state of helplessness or of inability or incapacity to do any part whatever of an occupation or profession, or to perform any work whatever for compensation, gain or profit; but the incapacity contemplated means incapacity or inability to the extent of being wholly and permanently unable to do substantially all of the material acts that are usually required to be performed in the occupation or profession or work in which the insured is engaged or in which he may engage within the contemplation of the particular insurance policy, in sub-

stantially the customary or usual manner. Each case must be determined upon a just consideration of the pertinent facts and the provisions of the particular insurance policy, the latter being considered in the light of the intent of the parties under the intendments of the law that the insurance policy shall afford the protection when it can legally and fairly be done.

(9) The plaintiff is a farmer. This is shown by the application for the insurance policy. He had a high school education. Before his injury he did much of his farm work himself. He was healthy and active before the injury, and was forty-three years old at the trial.

* * *

* * *, and that because of the major permanent injury and consequent ailments and continuous pains, he is physically incapacitated to such an extent as to be wholly and permanently unable to engage in any occupation or profession, or to perform any work for compensation, gain or profit, within the meaning of the policy contract. See *Equitable Life Assurance Society of United States* v. *Wiggins*, 115 Fla. 136, 155 So. 327; *Equitable Life Assurance Society of United States* v. *McKeithan*, 119 Fla. 486, 160 So. 883. See also, *Hagman* v. *Equitable Life Assurance Society*, 214 Ky. 56, 282 S. W. 1112; *John Hancock Mut. L. Ins. Co.* v. *Cave*, 240 Ky. 56, 40 S.W. 2d 1004, 79 A. L. R. 848."

In *Mutual Life Ins. Co. of N. Y.* v. *Daigle*, 142 F. 2d 1000, the Court said:

"'The rule is stated in 14 R. C. L., § 491, p. 1315, as follows, viz.:

"The rule prevailing in most jurisdictions is that the total disability contemplated by an accident insurance policy does not mean, as its literal construction would require, a state of absolute help-

lessness which can result only from loss of reason, since as long as one is in full possession of his mental faculties he is capable of transacting some part of his business, whatever it may be, although he is incapable of physical action. On the contrary, these courts, giving consideration to the object of the contract, hold that the 'total disability' contemplated by the agreement is inability to do substantially all of the material acts necessary to the prosecution of the insured's business or occupation in substantially his customary and usual manner.'' ''

In *Mutual Life Ins. Co. of New York* v. *Binion*, (Ga.) 33 S. E. 2d 448, suit was brought by the appellee to recover disability payments under a life insurance policy providing for total and permanent disability benefits. A judgment was rendered in favor of the plaintiff, and on appeal it was affirmed. The opinion reveals that the insured was a physican who operated a medical clinic. The policy was issued in 1929, and in 1937 the doctor decided that he had to quit work entirely or reduce to part time. He decided on part time work. In 1941 he retired from the practice of medicine and surgery. He was suffering from high blood pressure, heart disease, Bright's disease, arthritis and impairment of vision. He filed a claim for disability and payments were made from February, 1941 to August, 1943 when payments were discontinued. The record revealed that he had not received any compensation from the practice of medicine, though he had hired others to operate his clinic and received a percentage of the profits. In affirming the judgment the Court said:

"There was other evidence, but there was no evidence showing that the insured did any work in connection with the operation of the clinic and hospital except to receive daily reports. Even this activity cannot reasonably be related to insured's putting forth any effort mentally or physically. It

would more appropriately be classified as a check on investments rather than activity operation of a business. Hiring others to operate a business is not personal operation of the business. The fact that the insured is able to go to his office or place of business for a short time each day does not render disability less than total if in fact he could do no work there. *Turner* v. *Fidelity & Casualty Company*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; *Thayer* v. *Standard Life & Accident Insurance Company*, 68 N. H. 577, 41 Atl. 182; *Baldwin* v. *Fraternal Accident Association*, 21 Misc. 124, 46 N. Y. S. 1016. If one is obliged to employ others to manage his business and can give personal attention to only a few details the disability must be regarded as total. *United States Casualty Company* v. *Hanson*, 20 Colo. App. 393, 79 Pac. 176 At the time of the issuance of the policy insured was a physican and surgeon. He subsequently continued such practice and also operated the clinic and hospital. The evidence shows conclusively that he had completely stopped the practice of medicine and surgery and stopped all activity in operating the clinic and hospital except to receive daily reports. Under the definitions of total disability laid down by the Supreme Court, the finding of total disability was demanded by the evidence. *Mutual Life Insurance Company* v. *Barron*, Ga., 30 S. E. 2d 879. Under the rulings in the Barron case the policy sued on is one insuring against loss of earning capacity and not against loss of income. The fact that insured's income was more than usual for the time in question is immaterial if his personal effort did not produce it. The finding that the insured was totally and permanently disabled during the time in question was demanded."

• • •

"The insurance company conceded that the insured became totally and permanently disabled on February 14, 1951, and paid disability benefits from then until September, 1943. In the absence of any explanation why it discontinued the benefit payments and of the information upon which it acted in so doing, the finding for damages and attorney's fees was not unauthorized as a matter of law."

In *John Hancock Mut. Life Ins. Co.* v. *Schroder*, (Ala.) 180 So. 327, an action was brought for disability benefit under a life insurance policy. From a judgment for the plaintiff the defendant appealed. It was admitted at the trial that he was not able to engage in a substantial occupation for which he was fitted, considering his education and experience. The plaintiff had suffered an airplane accident which resulted in permanent injuries to both feet. Payments were made from June, 1932 to August, 1936, when the company refused to make further payments. The plaintiff was able to walk with the aid of canes. The record indicated that he was a salesman or solicitor. He could also drive to his customers' places of business and walk in without assistance, but he could not stand upon his feet without considerable pain. The doctors testified that he would be better off if his feet had been amputated. In affirming the judgment, the Court said:

"Contracts of insurance are written by the insurer, and, whenever there is ambiguity or uncertainty in the contract, the court will resolve the uncertainty in favor of the insured; or, if the contract is susceptible to two constructions, the one most favorable to the insured will be adopted. However, where there can be but one meaning, the court has no choice but to give it that meaning. In such case there is no room for construction. *McGifford* v. *Protective Life Ins. Co., supra.*"

"We have uniformly held that the term 'totally and permanently disabled from engaging in any occupation' is not to be construed as requiring a state of complete helplessness, but means no more than the inability to perform the material acts of insured's business or occupation in substantially his customary and usual manner."

CONCLUSION

We do not see how it can be contended seriously, that Dr. Stokes is competent to practice medicine. This is the occupation that he was engaged in when the policy was issued. As the Court said in *Equitable Life Assurance Society* v. *Bomar, supra*, the disability clause must be construed in the light of the statements made at the time of the application for the policy, and with respect to the occupation in which the insured was then engaged. If Dr. Stokes was competent and able to perform some other gainful occupation, notwithstanding the impairment of his health and his faculties, it is clearly upon the insurance company to show this upon a preponderance of the evidence. It was not necessary for the Doctor to prove a negative fact, if fact it be.

The Jury was not warranted in rejecting the testimony of the plaintiff, his wife and the several physicans who testified for him, and therefore the verdict was contrary to the weight of the evidence. The Court erred in denying the motion for a new trial. The trial was infected with the misconstruction, which the Jury placed upon the weight of the evidence, the failure of the Court to charge the Jury with respect to the burden of proof and the affirmative error committed with respect to other occupations of the insured.

The judgment should be reversed.

Respectfully submitted,

THOMAS H. ANDERSON,

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APPENDIX B

Brief of Appellee as Follows:

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 16,238

EDGAR W. STOKES, *Appellant*

v.

CONTINENTAL ASSURANCE COMPANY, an Illinois Corporation, Appellee

BRIEF OF APPELLEE

A.

STATEMENT OF CASE

The Appellee accepts the Appellant's statement of the case.

B.

STATEMENTS OF POINTS TO BE DISCUSSED

POINT I.

A. In the absence of a motion for a directed verdict, the sufficiency of evidence to support a verdict and judgment may not be tested on appeal (Tr. 256-259). *Baten* v. *Kirby Lumber Corp.*, 1939 5 Cir., 103 F. 2d 272; *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 1955 5 Cir., 222 F. 2d 954; *Atlantic Coast Line R. Co.* v. *Smith*, 1952 5 Cir., 135 F. 2d 40; *F. W. Woolworth Co.* v. *Seckinger*, 1942 5 Cir., 125 F: 2d 97; *Atlantic Coast Line R. Co.* v. *Mims*, 1952 5 Cir., 199 F. 2d 582; *Whelan* v. *Welch*, 269 Fed. 689.

B. The verdict of the jury was amply supported by the evidence (See argument).

POINT II.

A. Appellant has waived his right to object to the jury charge assigned as error by his failure to make timely objection to it. (Tr. 267-268, 278, 280). Rule 51, Fed. Rules of Civil Procedure. *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 1955 5 Cir., 222 F. 2d 954; *Atlantic Coast Line R. Co.* v. *Mims*, 1952 5 Cir., 199 F. 2d 582; *Standard Oil Co.* v. *Burleson*, 5 Cir., 117 F. 2d 412; *Western Fire Ins. Co. of Fort Scott, Kansas*, v. *Word*, 5 Cir., 131 F. 2d 541; *Good Holding Co.* v. *Boswell*, 5 Cir., 173 F. 2d 395; *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719.

B. The jury was fairly and accurately charged as to the law in the case. *New England Mutual Life Insurance Co.* v. *Huckins*, (Fla.) 173 So. 696.

ARGUMENT

POINT I.

A. In the absence of a motion for a directed verdict, the sufficiency of evidence to support a verdict and judgment may not be tested on appeal (Tr. 256-259).

The record (Tr. 256-259) reflects that at the conclusion of the testimony, the appellant failed to make any motion for a directed verdict. An examination of the entire record fails to reveal any such motion.

In *Baten* v. *Kirby Lumber Corp.*, 103 F. 2d 272, 273, this Court said:

> "We find that no motion by any appellant was made in the trial for an instructed verdict, so that no question of the sufficiency of the evidence has been properly raised; * * *."

In *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 222 F. 2d 954, the following language is found:

"(1) Appellee, insisting that the jury's verdict is amply supported on the record, points out that there was no motion for a directed verdict, nor any objection to the giving or the failure to give an instruction. So pointing it urges upon us that the assigned error presents nothing for our consideration under the plain provisions of Rule 50(b) and Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A., and the authorities construing and applying them. We agree that this is so.

"(2) This court has never departed from but has consistently reaffirmed the rule governing in cases of this kind, as laid down in Batem v. Kirby Lumber Corp., 5 Cir., 103 F. 2d 272, 274:

'"Whether the verdict is authorized by the evidence is a question not reserved in the trial. The defendants went to the jury without challenging its sufficiency, and no error can be attributed to the judge thereabout. Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict. Rule of Civil Procedure 50, 28 U. S. C. A., following section 723c, does not do away with but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient.'"

The judgment is affirmed."

In *Atlantic Coast Line R. Co.* v. *Smith*, 135 F. 2d 40, 41, the following language is found:

"(1-3) The defendant railroad made no motion for directed verdict on the second trial, but it now seeks to question the sufficiency of plaintiffs' evidence by attacking the action of the trial court in overruling its motion for new trial. Although we think the evidence sufficient to support the verdicts and judgments, it should be pointed out that sufficiency of evidence to support a verdict and judgment may not be

tested on appeal in this way. The test of sufficiency of the evidence may be made on the trial and preserved for appeal purposes by timely motion for directed verdict. Furthermore, in Federal Courts the granting or refusing of a motion for new trial rests within the sound discretion of the trial court, and its ruling on such motion will not be disturbed on appeal in absence of a showing of manifest abuse of discretion. No such abuse of discretion is shown here. Teche Lines v. Boyette, 5 Cir., 111 F. 2d 579."

Authorities supporting our contention are outlined in detail in *Whelan* v. *Welch*, 269 Fed. 689:

"(1) 1. It is asserted that the court erred in overruling a motion for a new trial based on the assumption that the verdict was not sustained by sufficient evidence. According to federal practice this is not assignable as error. Mr. Justice Story, as long ago as Barr v. Gratz, 4 Wheat. 213, 220 (4 L. Ed. 553), said that it 'is too plain for argument that such a refusal affords no ground for a writ of error.' See, also, Crumpton v. United States, 138 U. S. 361, 363, 11 S. Ct. 355, 34 L. Ed. 958; Wheeler v. United States, 159 U. S. 523, 524, 16 S. Ct. 93, 40 L. Ed. 244; Moore v. United States, 150 U. S. 57, 61, 14 S. Ct. 26, 37 L. Ed. 996; Brown v. Clarke, 4 How. 4, 15, 11 L. Ed. 850; United States v. Daniel, 6 Wheat. 542, 545, 5 L. Ed. 326.

"(2) If appellants desired to raise the question of the sufficiency of the evidence, they should have done so by a request for a peremptory instruction to return a verdict in their favor (German Insurance Co. v. Frederick, 58 Fed 144, 148, 7 C. C. A. 122; Western Coal & Mining Co. v. Ingraham, 70 Fed. 219, 222, 17 C. C. A. 71; Joplin & P. Ry. Co. v. Payne, 194 Fed. 387, 389, 114 C. C. A. 305); but they did not do so. On the contrary, they requested the court to submit the case to the jury, thus impliedly stating that there

was a question for the jury's consideration. Williams v. Vreeland, 250 U. S. 295, 298, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. They will not now be heard to say that the representation was not correct. United States v. Memphis, 97 U. S. 284, 292, 24 L. Ed. 937; Hartford Life Ins. Co. v. Unsell, 144 U. S. 439, 451, 12 S. Ct. 671, 36 L. Ed. 496; Walton v. Chicago, St. Paul, etc., Railway Co., 56 Fed. 1006, 6 C. C. A. 223; Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co., 85 Fed. 417, 421, 29 C. C. A. 239.

"Appellants refer us to a number of decisions wherein it was ruled that if the testimony is of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition thereto, the case should not be submitted to the jury. Of course that is true. But how must the question be raised, so that it may be examined by a reviewing court? Not for the first time by a motion for a new trial, but always by a request for a directed verdict. And that is the manner in which it was presented in the cases cited. None of them countenances the procedure followed here."

In *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582, 583, the court said:

"(4, 5) When it comes, through, to the merits of the claims of error it makes, appellant finds itself greatly hampered by its failure in the course of the trial to timely call the attention of the Court to the contentions it now makes. This is notably so with reference to its claim that the evidence is insufficient to support the verdict. Despite the rule requiring it, as a predicate for the assignment of error, no request for an instruction to that effect, either on the case as a whole or any phase of it, was made.

"We do not, therefore, consider appellant's contentions as to the insufficiency of the evidence."

The same rule was followed in *F. W. Woolworth Co.* v. *Seckinger*, 125 F. 2d 97, where it was said:

> "(1) Several specifications of errors are made on appeal. Those urging the insufficiency of the evidence to sustain the verdict will not be considered. No motion was made for a directed verdict, as required by Rule 50 of the Rules of Civil Procedure, 28 U. S C. A. following Section 723c, in order to raise a reviewable legal question as to the sufficiency of the evidence."

In the absence of any motion for a directed verdict by the appellant, the question of the insufficiency of evidence to support the verdict cannot be raised on this Appeal.

B. The verdict of the jury was amply supported by the evidence.

At the outset of this case the plaintiff below based his claim for disability insurance benefits upon the allegations in his complaint that he received bodily injury on February 26, 1952, through accidental means; that he was seriously and permanently injured and thereby totally disabled from continuing his occupation, that of a physician (Tr. 4-5).

Thereafter, the plaintiff amended his complaint to allege in addition that from December 10, 1952, to the present he has suffered a total loss of business time as a result of mental disease or illness precipitated by, or aggravated by, the accident of February 26, 1952, and as a result of mental disease or illness precipitated by, or aggravated by, a heart condition occurring on or about May, 1954 (Tr. 62).

The answer (Tr. 7-10) denied that the disability of the plaintiff, if any, came within the defendant's undertaking and averred that the plaintiff retired from his profession prior to the mentioned accident and that the plain-

tiff was not gainfully employed or engaged in any type of business or profession at the time of the accident.

The answer also denied that the plaintiff was injured or disabled by the accident so as to render him incapable or unfit to carry on his former business or occupation. "Nor was the claimed disability severe enough to cause him to 'suffer a total loss of all business time' had he chosen to carry on his former business or occupation."

At the close of all the testimony in the earlier cause it was agreed by counsel that there was no contention by the plaintiff of disability at the present time because of a heart condition (Tr. 359-360) and the jury was instructed, without objection, to disregard evidence respecting any present abnormal heart condition. They were instructed that they might consider such evidence in connection with the claim for total disability in the past.

We submit that ample evidence to support the verdict is found in the testimony of the two neuro-surgeons who testified, one for the plaintiff and one for the defendant.

Both Dr. Keedy, who testified for the plaintiff and Dr. Strain, the court appointed physician (Tr. 338) who was called by the defense, testified that they subjected the plaintiff to extensive clinical and diagnosis tests and that the results of the tests were negative or essentially negative (Tr. 315, 319, 325, 342).

In other words, although the plaintiff, formerly the director of a phychiatric hospital (Tr. 274), gave a history of psychiatric disturbances, the results of clinical or objective tests indicated that he was perfectly normal.

As to the accident of February 26, 1952, the only evidence was that of plaintiff below (Tr. 274-300).

He gave an account of skidding off the road and coming-to in a canal. Police who arrived at the scene did not take the plaintiff to a hospital but to the Clewiston Inn

(Tr. 278) where he received no medical attention other than that which he administered himself. He treated himself with penicillin to purify his blood (Tr. 278).

The next morning the plaintiff visited a physician in Clewiston who was at the Clewiston Hospital at the time. This physician treated the plaintiff for a hematoma on his abdomen. The physician did not hospitalize the plaintiff (Tr. 280, 294, 299, 300).

Two or three days after the accident plaintiff went to the Broward General Hospital in Ft. Lauderdale. At that time he was not under the care of a physician and sought admittance on his own account (Tr. 280). He remained in the hospital five or six days (Tr. 282).

A Dr. Patterson attended the plaintiff while he was in the hospital (Tr. 282). The plaintiff said he went to the hospital because of intense pain in his left leg, and also shock (Tr. 282).

It may be significant that neither the Clewiston police, who saw the plaintiff soon after the accident and took him to a hotel rather than a hospital, the Clewiston physician who treated plaintiff the following morning, nor Dr. Patterson were called as witnesses for the plaintiff.

The plaintiff's condition following the accident is important because his account of the accident to the physicians who later examined him had considerable bearing upon their several diagnoses.

Dr. Taylor (Tr. 226-257), a general surgeon, visited the plaintiff while he was at the Broward General Hospital. He said Dr. Patterson was the attending physician (Tr. 243). He was called to determine if the plaintiff required surgery because of possible blood clots in his leg.

Dr. Taylor was asked on cross-examination, "You did not diagnose his condition as incorporating or having or including a concussion, did you Doctor?"

He answered, "I didn't see him with one, no. I saw him two or three days after the accident." (Tr. 243).

Dr. Taylor said he looked in the hospital records for a suggestion of concussion and didn't see it (Tr. 243).

He also stated that forms which he had signed containing his diagnosis did not anywhere mention a concussion (Tr. 244-245).

Since the plaintiff below complained of a mental disease or illness precipitated by, or aggravated by, a heart condition occurring on or about May, 1954, it is necessary to examine the testimony of Dr. Dornberger (Tr. 185-226), a specialist in internal medicine (Tr. 185).

Dr. Dornberger testified that he first examined the plaintiff April (he probably meant May) 24, 1954 (Tr. 187). On the basis of his examination and electrocardiogram tracings which he made at the time, he suspected the plaintiff had a mild heart attack and sent him to the Broward Hospital (Tr. 189-190).

Dr. Dornberger consulted with his associate, Dr. Roberts, who disagreed with his diagnosis and believed that the plaintiff had acute rheumatism (Tr. 192). He also consulted with Dr. Chamberlain who was uncertain as to whether the condition was acute rheumatism or a mild heart attack but leaned uncertainly to the diagnosis of a mild heart attack (Tr. 193).

He caused a great many electrocardiogram tests to be run on the plaintiff and of innumerable tracings, only one, the one taken in his office on May 24, 1954, was abnormal. All of the others were normal (Tr. 208).

Asked if the plaintiff had not made an uneventful recovery he said, "Yes, insofar as we can determine. The difficulty that we have is that as a patient, he still complains of chest pains, shortness of breath, which are subjective symptoms, and it is difficult at best in this instance to be

sure whether or not they are actually pains of coronary disease, or whether they are what we call functional pains, chest wall pains." (Tr 209).

Dr. Dornberger said that the heart attack was in the least order of severity and admitted that the diagnosis was doubtful (Tr. 210).

Dr. Dornberger acknowledged that, in arriving at his diagnosis of mild heart attack, he relied at least to some extent upon the plaintiff's statement to him that he had suffered a heart attack four years previously and also that he relied upon the plaintiff's or someone's statement that the plaintiff had suffered concussion in the accident of February 26, 1952 (Tr. 217-218).

Dr. Dornberger was also asked, "Did he mention to you at that time, Doctor, or some time during your conversations, that he wanted you to make medical reports to various insurance companies in connection with what he alleged was a total disabiliy?", and answered, "Yes, sir." (Tr. 219).

The following questions were also asked and answered on cross examination:

"Q. All of these symptoms which you present were subjective through this period, were they not?

A. With the exception of one episode, which I think is irrelevant, I had to make a house call. He had an acute renal colic. He had a kidney stone.

Q. And by subjective, again, we mean complaints which he relates to you. He is telling you that he is worried or suffering some pain or other. Those are subjective things as against the things which you can find definitely as objective symptoms. Is that correct, sir?

A. That's right." (Tr. 220).

Dr. Keedy (Tr. 310-334), testifying for the plaintiff, stated that from his examination and from the history, it

was his opinion that the plaintiff was suffering disability; that he didn't think the plaintiff was mentally operating efficiently to do any type of productive work (Tr. 322).

There are several factors in Dr. Keedy's testimony which support the finding of the jury.

The witness specializes in neurology and neuro-surgery (Tr. 311). He had been seeing the plaintiff for over three years, visits averaging about six or eight weeks (Tr. 313). He had examined the plaintiff purely for examination purposes, and not for treatment (Tr. 327). He claimed he had noticed psycho-neurotic tendencies, and some tendencies verging on being trul, psychotic (Tr. 316). The treatment of psychiatric diseases and disturbances is not within his field (Tr. 327-328). Yet he had not sent the plaintiff to a psychiatrist for treatment (Tr. 327).

He had sent plaintiff to Dr. Jarrett, a psychiatrist for evaluation (Tr. 327) but he had no report from Dr. Jarrett, does not have his conclusions after his evaluation and does not know what he found (Tr. 331).

On the plaintiff's first visit to Dr. Keedy on January 30, 1953, the witness obtained a complete history, including an account of the accident of February 26, 1952, from the plaintiff (Tr. 313-316).

He testified, "Now at that time I felt that the patient was suffering from a post concussion syndrone which was manifested by mild headaches, forgetfulness, difficulty in concentrating, and irritability." (Tr. 316).

The witness also said: "Now on his general physical examination, all of his examination was essentially negative." (Tr. 315).

Later the witness had an electro-encaphalogram run on the plaintiff "and the record that we obtained was a normal record, indicating that he hadn't sustained any ac-

tual tearing of his brain or any blood clot, or anything of an organic nature."

On cross examination the witness admitted giving a written report to the North Western Mutual Life Insurance Company on June 26, 1953, in which he answered, "No," to the question, "Is the insured now totally disabled?" To the question, "'From what date has the insured been continuously disabled?'" he answered, *"Has not been while under my care."*

The witness explained that he meant by these answers that the plaintiff was not totally physically disabled (Tr. 325).

Dr. Strain (Tr. 338-345), a specialist in surgery of the nervous system (Tr. 338), called by the defense, had examined the plaintiff as a court appointed physician (Tr. 338).

After describing a rather elaborate examination of the plaintiff (Tr. 339-341) he testified that "All his neurological examination was within normal limits." (Tr. 342).

The witness testified that he did not attempt to evaluate the psychiatric functions of the plaintiff because he is not a psychiatrist (Tr. 343).

So here we have a plaintiff who comes to a jury and says there is something wrong with him, and says in essence: I don't know exactly what it is. It may be from an accident which I had several years ago and in which I may have suffered a concussion or it may be from a light heart attack which I may have suffered. Several eminent physicians have examined me and found me physically fit. Their clinical tests indicate that there is nothing wrong with my brain or nervous system or with my heart, but I want you to pronounce me permanently and totally disabled!

Had the jury done so, it would have had to delve deeply into the realm of speculation.

The appellant in his brief, page 17, contends that since the plaintiff himself has testified to his disability, it would make no difference if all of the doctors in the world testified that he was all right. The jury would be bound to accept his testimony unless convinced he was committing perjury, and there was no evidence of perjury.

Should this contention be enunciated as law, it could lead to serious consequences and absurdities.

Any person involved in an accident could contend that he suffered pain somewhere or everywhere in his body. It would be next to impossible to prove that his ills were manufactured or imaginary even though medical experts could testify that his symptoms were not supported by clinical diagnosis, and the jury would be bound to believe and give credit to his testimony. This would be true even though he testified with his fingers crossed for his demeanor on the stand would have no bearing under such a rule.

Fortunately, such is not the law.

In *United States* v. *Burns*, 69 F. 2d 636, decided by this court, the appellee sued to recover upon a war risk insurance policy which had lapsed for non-payment of premiums eleven years prior to suit. The appellee claimed that he was totally and permanently disabled prior to the lapse of the policy. There was a judgment for the appellee and the Government appealed.

Of three physicians who testified for appellee, the testimony of two had no tendency to prove that the appellee was totally and permanently disabled at the time of the policy lapse.

The other physician, Dr. McRea, had first examined appellee ten days prior to trial for the purpose of testifying in the trial.

Dr. McRea on direct, testified "as to the appellee, when he was examined, narrating a history of his case."

He testified that, "I would consider him permanently disabled." Appellee's counsel then asked the witness: "and totally disabled from the history of his case?" The witness replied: "Yes, sir, that is, in the condition that he is in." In answer to a question from the court, this witness testified that he thought the appellee was totally disabled on November 20, 1920, when he was discharged from hospital.

In cross examination the doctor stated, "My testimony or opinion that he was totally disabled when he was discharged from the Army is based upon my examination and the record that he had at the Walter Reed Hospital."

This court said:

> "(5, 6) The above-mentioned statement by Dr. McRea of his opinion that appellee was totally disabled when he was discharged from the hospital and sent to Florida was devoid of probative value. The testimony of the witness shows that his opinion was based solely on what appellee told him a few days prior to the trial as to his injuries and bodily ailments, and on the record he had in the Walter Reed Hospital. The testimony of the witness fairly negatives the conclusion that he had any knowledge or information as to the work appellee did between the date of the lapse of the policy and the date of the examination by the witness, or as to the effect or lack of effect of that work on appellee's case. A basis of the stated opinion of the witness was a history of appellee's case which did not disclose fact which constituted a material part of the history of that case disclosed by evidence before the jury. It is fairly inferable that the case upon which the witness gave his opinion was substantially different from the one which the jury found from the evidence. The premises from which the witness reached his conclusion not including material facts disclosed by the evidence, those premises were inade-

quate to support an opinion as to the case which it is to be inferred was found by the jury from the evidence to be the real one." (cases cited).

And in *United States* v. *Shashy,* 75 F. 2d 222, decided by this court in 1935, it was held that the opinion of a physician that the appellee was totally and permanently disabled within the provisions of a war risk policy due to a paralyzed condition of one of insured's vocal chords was without probative weight.

POINT II.

A. Appellant has waived his right to object to the jury charge assigned as error by his failure to make timely objection to it (Tr. 267-268, 278, 280).

The following argument is in response to Questions II and III propounded in the appellant's brief (Tr. 23-24). As to Question II propounded by appellant, the record is silent as to any request by the appellant of an instruction with respect to burden of proof.

The pertinent portion of *Rule 51, Fed. Rules of Civil Procedure,* provides:

> "• • • No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make objection out of the hearing of the jury."

At the conclusion of the Court's charge (Tr. 280) the judge inquired, "Have there been any instructions, counsel, that you have noted that we passed over?"

Counsel for appellant answered: "I think that covers it, Judge."

The Court then asked counsel to come forward, they approached the bench out of hearing of the jury, after which the jury retired.

At that time the record reflects no objections to the charge.

Also, at the conclusion of the discussion of the instructions (Tr. 260-272) it would appear that counsel had had an opportunity to examine the intended instructions (Tr. 272) and that counsel for appellant voiced no objection at that time (Tr. 273).

In the discussion of the proposed instructions now complained of in the appellant's brief (Tr. 267), no objection to this charge is shown.

This Court has stated that timely objection to the trial court's charge must be made in order to preserve error: *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582-583, cited *supra*; *Boudreaux* v. *Mississippi Shipping Company, Inc.*, 222 F. 2d 954, cited *supra*; *Standard Oil Co.* v. *Burleson*, 117 F. 2d 412; *Western Fire Ins. Co. of Fort Scott, Kansas*, v. *Word*, 131 F. 2d 541; *Good Holding Co.* v. *Boswell*, 173 F. 2d 395.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719, the Court said:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial • • •."

Since no specific objections were made to the Court's charge prior to the time the jury retired, the appellant

cannot at this time, on appeal, question the correctness of the charges given.

B. The jury was fairly and accurately charged as to the law in the case.

That portion of the charge which is objected to by the appellant and which is quoted on pages 24 and 25 of his brief, does not comprise the entire charge covering the appellant's right to recover.

Any objection which appellant might make to his quoted portion would appear to be cured by the portion which immediately precedes it in which the court charged (Tr. 277-278):

> "I charge you that since the policy says, ' "loss of business time," ' that ' "business time" ' in a policy insuring against loss of business time caused by accidental injury or sickness, refers to time lost from the occupation in which the insured was engaged at the time the disability was sustained, or the time lost from some other occupation in which the insured might have been able to have been engaged within the range of his normal ability, taking into consideration his education, training and work, and his physical and mental condition.
>
> "Should you find from the preponderance of the evidence that the plaintiff, as a result of injury or sickness as described in the Complaint as amended, was totally disabled by bodily injury or sickness during the period commencing September 10, 1952, through and including January 26, 1956, from engaging in his occupation as a physician, or engaging in any occupation in which he was able, taking into consideration his education, training and work, and his physical and mental condition, then you will find for the plaintiff and assess his damages at the rate of $150.00 per month for such months, if any, that you find him to have been so disabled.

"Disability from performing an occupation as used in these instructions, means substantial or practical inability to do those substantial and material acts and duties characterizing and pertaining to the occupation, and necessary to the carrying on of the occupation, whether it be the occupation in which plaintiff was engaged, or one in which plaintiff could have engaged based upon those factors mentioned by the Court.

"If the plaintiff who was insured was disabled by bodily injury or by sickness so as to suffer a total loss of all of his business time, he can recover the monthly payments promised in the policy for the time he remained so disabled."

From the charge, taken as a whole, the jury must have readily understood that the plaintiff was entitled to recover if disabled to perform his professional duties or the duties of any occupation for which he was qualified by education, training and work.

It is quite apparent that the jury charges, taken as a whole, fairly and accurately instructed the jury as to the law applicable to the case. It has long been recognized that the true test as to the efficacy and propriety of jury charges is whether, taken as a whole, they fairly impart to the jury, a correct interpretation of the law to which they can apply the facts and not whether one, at his leisure, may with a microscope detect some minor or technical flaw which would not in any event have come to the attention of the jury or have affected in any way their decision.

The portion of the Charge to which the appellant objects would appear to have been lifted almost verbatim from *New England Mutual Life Insurance Co.* v. *Huckins*, (Fla. 1937) 173 So. 696, 700, paragraph numbered 7, 8, which portion is quoted on page 26 of appellant's brief.

D.

Conclusion.

It is respectfully submitted that in the absence of a motion by the appellant for a directed verdict and any specific objection to the charge given by the Court, there is nothing before this court for consideration and it is, therefore, urged that the judgment of the District Court be affirmed.

Respectfully submitted,

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By .....,
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APPENDIX C

Appellant's Reply Brief

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 16,238

EDGAR W. STOKES, *Appellant*

v.

CONTINENTAL ASSURANCE COMPANY, an Illinois Corporation, *Appellee*

APPELLANT'S REPLY BRIEF

This reply brief is directed to the points raised by the Appellee under Points I and II.

There is no doubt that the cases cited by Appellee generally support its statement to the effect that the sufficiency of the evidence is not reviewable on appeal where a motion for a directive verdict is not made in the trial court.

The rule of these cases is inapplicable here for the reason that there was no credible testimony that warranted a verdict for the defendant.

There is no doubt that the plaintiff had the automobile accident. The defendant says that there was no proof of this fact other than the plaintiff's own statement, and says that it is rather significant that neither the police who took the plaintiff to the Clewiston Inn, nor the physician who treated him the following morning, nor Dr. Patterson were called as witnesses.

What there is significant about this we do not know. There is no testimony whatever that the plaintiff did not have the accident. What the policeman could have added to the trial is unfathomable.

Paragraph 4 of the complaint alleges that on or about February 26, 1952, plaintiff received bodily injury solely through accidental means in that he was seriously and permanently injured in an automobile accident (R. 25).

The allegations of this paragraph are denied (R. 13) but in its counterclaim the defendant said this (R. 18):

> "4. While said policy of insurance was in effect, and on or about the 26th day of February, 1952, the said Edgar W. Stokes filed a proof of claim on said policy above described, claiming and contending that he had been in an automobile accident resulting in the total loss of all his business time. The counterclaimant accepted such proof of claim as being true, and on January 14, 1953, the counterclaimant paid to the said Edgar W. Stokes the sum of $6.25 covering a period of hospitalization from February 29, to March 5, 1952; and the sum of $525.00 covering a period of disability from the date of said accident to and including September 10, 1952, less a three month excepted, or waiting period, as prescribed in said policy."

The next paragraph of the counterclaim alleged that Stokes made further demands upon the defendant for the payment of the monthly indemnity, contending that he was permanently disabled from and after September 10, 1952, and upon further investigation the defendant discovered "the following facts":

(a) Prior to the accident Stokes completely discontinued his practice as a physician and retired from said practice, and disassociated himself from the operation of the hospital previously operated by him, and at the time of the alleged accident he was not gainfully employed or engaged in any type of business, occupation or profession, nor was he devoting any time thereto so that any claimed disability did not result in the total loss of all business time so as to entitle the plaintiff to monthly indemnity.

(b) Stokes was not injured in the accident of February 26 so as to render him unfit to carry on his former business or occupation, nor was the claimed injury severe enough to render him incapable or unfit to devote all of his time to his former business or occupation.

It thus appears that actually the issues that were presented to the jury were those, or should have been those, which arose out of the allegations in the defendant's counterclaim, and that therefore it was incumbent upon the defendant to prove that Stokes had not in fact suffered a loss of business time within the terms of the policy or was not rendered incapable to carry on his former business or occupation.

Of course, the allegations in this paragraph of the counterclaim are inconsistent because if Stokes had no injury, then it makes no difference whether he was rendered unfit to continue it.

The counterclaimant prayed for a declaratory judgment declaring the rights, liabilities, duties, responsibilities and legal relations of the parties; that the reciprocal rights and liabilities be declared and determined fully in accordance with the policy of insurance, and that plaintiff be enjoined from filing and prosecuting the actions which he had previously instituted in the Civil Court of Record of Dade County, and one which was transferred to the court below and was the subject of the present suit.

We think this situation presented by the pleadings and the evidence is therefore sufficient to bring the case within the exception to the rule relied upon by the Appellee. This exception is that where the insufficiency of the evidence constitutes plain error apparent on the face of the record which if not noticed would result in a manifest miscarriage of justice, the action of the trial court in entering judg-

ment for the opposing party would be reversed (Barron and Holtzoff, Vol. 2, Sec. 1081, page 781).

Respectfully submitted,

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